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No. 99-

In The Supreme Court of the United States

OCTOBER TERM, 1999

GREGORY C. PORTER, *Petitioner,*

v.

UNITED STATES, *Respondent.*

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED FOR REVIEW

1. Should the Board for Corrections of Military Records (BCMR) be permitted to apply a heightened "egregious error" standard in lieu of the long-standing "harmless error" standard adopted in Sanders v. United States, 594 F.2d 804 (Ct. Cl. 1979)) (en banc), (cited with approval in Chappell v. Wallace, 426 U.S. 296, 303 (1983)?

2. Congress having relinquished its authority to legislate private bills of relief for servicemembers (2 U.S.C. § 190(g)) and delegated this function to the BCMR (10 U.S.C. § 1552), does 10 U.S.C. § 628 afford discretion to civilian BCMRs to defer to military authorities and to use an insuperable "egregious error" standard in resolving requests for corrections of military records?

3. May the BCMR condition relief upon proof of an "egregious error" when the governing regulatory authority prescribes a "probable material error" standard?

4. Where the scoring procedures of the Air Force's SSBs result in a supercompetitive standard for selection, is it an abuse of discretion for the AFBCMR to substitute an SSB remedy for the traditional correction and backpay remedies afforded under 10 U.S.C. § 1552?

5. May the government or a Court of Appeals rely in any fashion on an apparently fraudulent report of administrative proceedings?

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In the Supreme Court of the United States

October Term, 1999

GREGORY C. PORTER, *Petitioner,*

v.

UNITED STATES, *Respondent.*

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT

Gregory C. Porter, a former active-duty Air Force officer, respectfully petitions for writ of certiorari to review the judgment of the United States Court of Appeals for the Federal Circuit in this case.

Military pay is a function of statute. Bell v. United States, 366 U.S. 393 (1961). Active duty soldiers have a statutory right to be paid until their service is properly terminated. 37 U.S.C. § 204; Sanders v. United States, 594 F.2d 804, 810 (Ct. Cl. 1979) (en banc). Pursuant to this statute, soldiers have traditionally been able to maintain Tucker Act[1] suits for back pay in their existing grade when improperly separated on the premise that an improper

[1] 28 U.S.C. § 1491. All Tucker Act claims are appealed to the Court of Appeals for the Federal Circuit. 28 U.S.C. § 1295. There will likely never be a split of authority among the circuit courts in a Tucker Act matter.

separation does not terminate the right to continue drawing pay in that grade. Id; Adkins v. United States, 68 F.3d 1317, 1327 (Fed. Cir. 1995). The decision below wrongly extinguishes this long-standing cause of action and replaces it with a claim for pay in a higher grade, in apparent conflict with Testan v. United States, 424 U.S. 392 (1976).

Since their inception, Boards for Correction of Military Records (BCMRs) have had a liberal mandate to do justice and courts have repeatedly recognized that correction boards "have an abiding moral sanction to determine, insofar as possible, the true nature of an alleged [error or] injustice and to take steps to grant thorough and fitting relief." Yee v. United States, 512 F.2d 1383, 1387-1388 (Ct. Cl. 1975), quoting Duhon v. United States, 461 F.2d 1278, 1281 (Ct. Cl. 1972); Caddington v. United States, 178 F. Supp. 604 (Cl. Ct. 1959). The decision below imposes an insuperable "egregious error" standard for correction of records in BCMRs. This standard violates both the long-standing precedents above as well as the governing regulations of all three military departments which prescribe that a military record will be corrected upon showing of "probable material error." 32 C.F.R. § 865.4 (1998) (Air Force); 32 C.F.R. § 581.3 (1998) (Army); 32 C.F.R. §723.3 (1998) (Navy).

In addition, the standard effectively eliminates officers' correction remedy in the civilian BCMR and forces them to seek alternative back pay relief in a military forum. In 1947, Congress passed 2 U.S.C. § 190(g) precluding private bills of relief to servicemembers correcting their military records. As a result of this statute, servicemembers effectively lost their constitutional right of access to the legislative process.[2] Concurrently, Congress passed another statute, 10 U.S.C. §

[2] Cf. Romer v. Evans, 517 U.S. 620 (1996) (statute barring gays access to state legislative process held unconstitutional).

1552, which created boards of civilians (BCMRs) to correct errors. The intent of this statute was to provide a substitute *civilian* forum to redress wrongs and errors by the *military*. Proper v. United States, 139 Ct. Cl. 511, 526 (1957) ("Since the errors or injustices which might require correction were originally made by the military, Congress made it manifest that the correction of those errors and injustices was to be in the hands of civilians."); 34 C.F.R. 831.2 (1949) (10 U.S.C. § 1552 "is construed as a substitute for the correction of military records by Congressional action").

The Court of Appeals' elimination of veterans' substantive pay rights, its imposition of an "egregious error" standard in the BCMR, and its transfer of the BCMR's functions to military officials are completely unwarranted and unsustainable.

Opinions Below

The Court of Appeals' decision reversing the judgment of the Court of Federal Claims, 163 F.3d 1304, is reproduced in the Appendix ("App") at App 1. Its order denying rehearing and declining rehearing en banc is at App. 48. The relevant decisions of the Court of Federal Claims are at App. 50, App. 84, App. 95, and App. 100. The relevant opinions of the AFBCMR are at App. 109, and App. 115. The latter is referred to as the "Second Addendum" and a photocopy of the original has been provided to the Clerk as a lodging with a letter of even date with this filing.

Jurisdiction

The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1) (1998). The judgment of the Court of Appeals was entered on November 9, 1998. A timely petition for rehearing was denied on January 20, 1999.

Statutory and Regulatory Provisions

2 U.S.C. § 190(g) provides in pertinent part:

> No private bill or resolution (including so-called omnibus claims or pension bills), and no amendment to any bill or resolution, authorizing or directing . . . (3) the correction of a military or naval record, shall be received or considered in either the Senate or the House of Representatives.

(**NOTE**: Partial repeal of Section 2 of H. Res. 274 of the Ninety-sixth Congress, Nov. 4, 1979, provides that this section, insofar as it relates to the Senate, is repealed. The subject is now governed by the Standing Rules of the Senate, which provides the same result.)

10 U.S.C. § 1552 provides (in pertinent part):

> (a)(1) The Secretary of a military department may correct any military record of the Secretary's department when the Secretary considers it necessary to correct an error or remove an injustice. Except as provided in paragraph (2) [in certain cases involving enlisted personnel], such corrections shall be made by the Secretary acting through boards of civilians of the executive part of that military department. The Secretary of Transportation may in the same manner correct any military record of the Coast Guard.
>
> . . .

(3) Corrections under this section shall be made under procedures established by the Secretary concerned. In the case of the Secretary of a military department, those procedures must be approved by the Secretary of Defense.

. . .

(c) The Secretary concerned may pay, from applicable current appropriations, a claim for the loss of pay, allowances, compensation, emoluments, or other pecuniary benefits, or for the repayment of a fine or forfeiture, if, as a result of correcting a record under this section, the amount is found to be due the claimant on account of his or another's service in the Army, Navy, Air Force, Marine Corps, or Coast Guard, as the case may be, or on account of his or another's service as a civilian employee . . . .

10 U.S.C. § 628 (1980) (later amended) provided (in pertinent part):

(b)(1) In the case of an officer who is eligible for promotion who was considered for selection for promotion by a selection board but was not selected, the Secretary of the military department concerned, under regulations prescribed by the Secretary of Defense, may convene a special selection board under this subsection . . . to determine whether such officer should be recommended

for promotion if the Secretary concerned determines that--

(A) the action of the board which considered the officer was contrary to law or involved material error of fact or material administrative error; or

(B) the board did not have before it for its consideration material information.

(2) A special selection board convened under paragraph (1) shall consider the record of the officer as his record, if corrected, would have appeared to the board that considered him. That record shall be compared with the records of a sampling of those officers of the same competitive category who were recommended for promotion, and those officers who were not recommended for promotion, by the board that considered him.

(3) If a special selection board convened under paragraph (1) does not recommend for promotion an officer whose name was referred to it for consideration, the officer incurs no additional failure of selection for promotion.

(c)(1) Each special selection board convened under this section shall submit to the Secretary of the military department concerned a written report, signed by each member of the board, containing the name of each officer it recommends for promotion and certifying that

the board has carefully considered the record of each officer whose name was referred to it.

(2)The provisions of sections 617(b) and 618 of this title apply to the report and proceedings of a special selection board convened under this section in the same manner as they apply to the report and proceedings of a selection board convened under section 611(a) of this title.

(d)(1) If the report of a special selection board convened under this section, as approved by the President, recommends for promotion to the next higher grade an officer whose name was referred to it for consideration, such officer shall, as soon as practicable, be appointed to the next higher grade in accordance with subsections (b), (c), and (d) of section 624 of this title.

(2) An officer who is promoted to the next higher grade as the result of the recommendation of a special selection board convened under this section shall, upon such promotion, have the same date of rank, the same effective date for the pay and allowances of that grade, and the same position on the active-duty list as he would have had if he had been recommended for promotion to that grade by the board which should have considered, or which did consider, him . . . .

10 U.S.C. § 628 (October 17, 1998) provides (in pertinent part):

(b) Persons considered by promotion boards in unfair manner.

(1) If the Secretary of the military department concerned determines, in the case

of a person who was considered for selection for promotion by a promotion board but was not selected, that there was material unfairness with respect to that person, the Secretary may convene a special selection board under this subsection to determine whether that person (whether or not then on active duty) should be recommended for promotion. In order to determine that there was material unfairness, the Secretary must determine that--

(A) the action of the promotion board that considered the person was contrary to law or involved material error of fact or material administrative error; or

(B) the board did not have before it for its consideration material information.

(2) A special selection board convened under paragraph (1) shall consider the record of the person whose name was referred to it for consideration as that record, if corrected, would have appeared to the board that considered him. That record shall be compared with the records of a sampling of those officers of the same competitive category who were recommended for promotion, and those officers who were not recommended for promotion, by the board that considered him.

(3) If a special selection board convened under paragraph (1) does not recommend for promotion a person whose name was referred to it for consideration, the person incurs no additional failure of selection for promotion.

. . .

(d) Appointment of persons selected by boards.

(1) If the report of a special selection board convened under this section, as approved by the President, recommends for promotion to the next higher grade a person whose name was referred to it for consideration, that person shall, as soon as practicable, be appointed to that grade in accordance with subsections (b), (c), and (d) of section 624 of this title. However, in the case of a board convened under this section to consider a warrant officer or former warrant officer, if the report of that board, as approved by the Secretary concerned, recommends that warrant officer or former warrant officer for promotion to the next higher grade, that person shall, as soon as practicable, be appointed to the next higher grade in accordance with provisions of section 578(c) of this title (rather than subsections (b), (c), and (d) of section 624 of this title).

(2) A person who is appointed to the next higher grade as the result of the recommendation of a special selection board convened under this section shall, upon that appointment, have the same date of rank, the same effective date for the pay and allowances of that grade, and the same position on the active-duty list as he would have had if he had been recommended for promotion to that grade by the board which should have considered, or which did consider, him. In the case of a person who is not on the active-duty

list when appointed to the next higher grade, placement of that person on the active-duty list pursuant to the preceding sentence shall be only for purposes of determination of eligibility of that person for consideration for promotion by any subsequent special selection board under this section.

. . .

(f) Convening of boards. A board convened under this section--(1) shall be convened under regulations prescribed by the Secretary of Defense . . . .

Department of Defense Directive (DoDD) 1320.11 (1996) provides (in pertinent part):

DEFINITIONS

4. Special Selection Board. . . . Special Selection Boards make select and nonselect recommendations, as distinguished from providing advisory opinions as to whether an officer would have been selected had an officer been properly considered by the original board.

AFR 36-89 ¶ 35 (1992) provides (in pertinent part):

(b) An SSB will consider the record of the officer as it would have appeared to the original board had the officer been properly considered. The officer's record will be compared with benchmark records from the original board (paragraph 16).

(c) SSBs will use the scoring procedures outlined in paragraph 14.

(d) The applicant will be selected if the SSB finds the applicant fully qualified for promotion and if his or her record scores higher than all the nonselect records and ties at least one of the selected records from the original board.

AFR 36-89 ¶ 14 (1992) provides in pertinent part:

(b)(3)Board members will score records by secret ballot, that is, without benefit of discussion, unless a significant difference (a split) occurs in the scores given a particular record (subparagraph e). Board members may request to discuss records that did not split. The board president may approve or disapprove such requests. . . .

(d) Scoring Scale:

(1) For board or competitive categories with quotas less than 100 percent, the following scoring scale will be used:

10.0	Absolutely superior
9.5	Outstanding record
9.0	Few could be better
8.5	Strong record
8.0	Slightly above average
7.5	Average
7.0	Slightly below average
6.5	Well below average
6.0	Lowest in potential

e. Scoring Splits:

(1) As board members complete their scoring on a particular record, the administrative staff will review the scores to determine if any significant differences exist between the scores of a given record.

(2) A significant difference, or a split, is defined as a difference of more than one and a half points between any two scores on a record: for example, 6 and 8, or 8 and 10. . .

(3) When a split occurs in the scoring of an officer's record, the board members may discuss the record and may change their scores or votes as required to resolve the split. Discussion must be constrained as explained in subparagraph b(3). Board members may request to reconsider their scoring of records which did not split. The board president may approve or disapprove such requests.

f. Identifying the "Gray." During the board, the administrative staff will record the board members' scores in a computerized score file, produce preliminary scoring runs (a cumulative order of merit fore each panel), and verify the accuracy of the file. "Gray" occurs on an order of merit when the quota line (the selection percentage) falls among officers who have the same score.

AFR 36-89 ¶ 16 (1992) provides (in pertinent part):

On adjournment of the board, recorders will collect all score rosters, internal working papers, etc. Board members will not be allowed to retain any documents. Following approval of the board's results by the Assistant Secretary of Defense (Force Management and Personnel), the recorders will destroy all score rosters and internal working papers associated with the board that are not part of the board record. Before destroying the score rosters, five records from among the lower scoring selects and five records from among the highest scoring nonselects . . . will be identified. This sample of records, called benchmark records, will be used if special selection boards (SSBs) are required.

32 CFR § 865 (1993) (found at 50 Fed. Reg. 36426 *et seq.*) provides (in pertinent part):

Subpart A--Air Force Board for Correction of Military Records

. . .

§ 865.3 Function of the board.

The function of the Board is to consider all applications properly before it to determine the existence of an error or an injustice and, when appropriate, to make recommendations to the Secretary of the Air Force.

§ 865.4 Board jurisdiction.

The Board shall have jurisdiction to review and determine all matters properly brought before it, consistent with existing law.

§ 865.9 Consideration of application.

Denial of Application. The Board may deny an application if it determines that insufficient relevant evidence has been presented to demonstrate the existence of probable material error or injustice, that the applicant has not exhausted other effective administrative or legal remedies available to him or her, that effective relief cannot be granted, or that the applicant did not file his or her application within 3 years after he or she discovered or reasonably could have discovered the alleged error or injustice . . .

§ 865.14 Access to Records

(a) *Official Records.* the applicant will have access to all records considered by the Board with the exception of any classified and privileged matter contained therein.

§ 865.18 Deliberations, findings, decisions, and recommendations

(a) *Deliberations*. Only members of the Board and its staff will be present during the deliberations of the Board.

(b) *Further Information*. During the course of review of the case, when it appears to the Board's satisfaction that the facts have not been fully and fairly disclosed by the records or by the testimony and other evidence before the Board, the Board may require the applicant to obtain, or the Board may obtain, such further information as it may consider essential to a complete and impartial determination of the facts and issues. The applicant will have access to evidence developed by the Board on its own motion in accordance with § 865.14 and may submit additional comments with regard to the evidence.

(c) *Findings, Decisions, and Recommendations*. Following a hearing the Board will make written findings, decisions, and recommendations. A majority vote of the members present on any matter before the Board will constitute the action of the Board and will be so recorded.

§ 865.20 Record of Proceedings.

When the Board has completed its deliberations, a record of proceedings will be prepared. Such a record will indicate whether or not a quorum was present and the name and vote of each member present. The record of proceedings will include the application for relief, briefs and written arguments; advisory opinions; the findings, conclusions, and recommendations of the Board; and all other papers, documents, and reports necessary to reflect a true and complete history of the proceedings. The Report will also include a transcript of testimony and any minority reports. The record so prepared will be certified as true and compete by the signature of the panel chairman or designee.

Statement of the Case

Petitioner was separated from active duty as a sole and direct consequence of being nonselected for promotion by two promotion boards. 10 U.S.C. § 631. In his records were derogatory comments and evaluations and false duty titles. Petitioner filed an application for correction of military records in 1984 alleging that his frequently-drunk rating supervisor set him up to take a fall for the supervisor's drinking buddy. In 1985, the AFBCMR found error in Petitioner's record, made a partial correction, and referred his (still) erroneous records to two special selection boards (SSBs) so that he could be reconsidered for promotion. Petitioner's SSBs convened in 1986 and nonselected him.

Petitioner filed another application in the AFBCMR in 1988 and a request for reconsideration in 1990. Unsuccessful in these endeavors, Petitioner filed a wrongful separation suit in the Court of Federal Claims, *pro se,* for correction of his record errors, voidance of his promotion passovers, constructive reinstatement, and back pay pursuant to 37 U.S.C. § 204.

The Court of Federal Claims (the "Trial Court") noted that there appeared to be material errors in Petitioner's promotion board record, as reviewed by both the regular promotion boards and the 1986 SSBs. App. 62-70. After determining that the AFBCMR record contained no evidence[3] to support a harmless error finding, the Trial

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[3] With respect to the error which the AFBCMR had corrected in 1985, that court noted that the AFBCMR found that Petitioner's submission was "'sufficient to overcome the rationale expressed by the Air Staff [that Porter would not have been promoted in any event].'" App. 52. With respect to the still uncorrected errors in Petitioner's record, the court stated: "Not having conceded the OER or OSB errors, neither the AFBCMR nor the government, understandably, has made any attempt to present facts or grounds sufficient for determining that, even with the

Court reminded the Air Force that it had the ultimate burden of showing harmlessness. App. 70. The Trial Court ordered the AFBCMR to make a "harmless error" determination and it specified that the AFBCMR had to make these determinations *itself*. App. 78.

On remand, the AFBCMR corrected the remaining errors in Petitioner's promotion board records. The Air Force proffered no evidence[4] and the AFBCMR made no "harmless error" determination. Instead, the AFBCMR required Petitioner to satisfy a "no doubt of selection" standard for an AFBCMR-directed promotion. App. 113. The AFBCMR then recommended that Petitioner's record be reconsidered by two new SSBs and made all further relief contingent upon the SSBs:

> If the applicant is nonselected by the SSBs, no further action will be required on his application. However, if he is selected for promotion, the applicant will be provided the opportunity to request reinstatement in the Air Force and his request will be considered by the Board.

App. 113.

Two new SSBs, convened in November 1993, non-selected Petitioner. Petitioner received a letter from the Air Force Military Personnel Center stating, "The SSB determined that had your corrected records been considered by the original boards, you would not have been selected for

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errors, the SSB would have reached the same decision regarding Mr. Porter's likelihood of promotion by the original selection boards." App. 70.

[4] The exhibits before the AFBCMR are listed on the last page of the 1993 Report of Proceedings (ROP) (App. 114) and are described in the text of the ROP. They consist of the administrative record from the AFBCMR's earlier proceedings (1985, 1989, and 1990) and the court's 1992 Order.

promotion." *Letter from Steven M. Sheehan to Gregory C. Porter, dated 26 Jan 94.* The case then returned to the Trial Court.

In the Trial Court, the government moved for summary judgment, arguing that the Petitioner's SSB non-selections established harmless error. The Trial Court denied the government's motion (App. 84) for two principal reasons. First, very early in the litigation, the Air Force had admitted that its SSBs were potentially more competitive than the original board. App. 52-53 n4, App. 74 (text and n18). In addition, the Court observed that the Air Force's scoring regulation imposed a manifestly supercompetitive standard. App. 92 n4. Thus, as a factual matter, SSBs did not measure harm in the original promotion board.[5] The Trial Court's second reason for denying the government's summary judgment motion was that military SSBs cannot perform the functions of the civilian BCMR under the BCMR's enabling statute, 10 U.S.C. § 1552. App. 91.

Based on the foregoing, the Trial Court concluded that Petitioner's promotion passovers must be voided. An additional reason for this decision, articulated in a clarification order dated Dec. 30, 1994 (App. 95), was the Trial Court's view that 10 U.S.C. § 628 (1980) authorized SSB consideration only for an "officer"--meaning that a former officer had to be reinstated before meeting an SSB.

The Trial Court's October 1994 Order (App 84) compelled the Air Force to void Petitioner's promotion passovers and to constructively reinstate him. The order also remanded to the AFBCMR one last time to determine

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[5] The Trial Court held that this did not violate the SSB enabling statute, 10 U.S.C. § 628, because that statute required only that the Petitioner's record be compared with a "sampling" of records from the original board. App. 88.

whether Petitioner's 1993 SSBs had been infected with procedural error.

In response to this remand order, a document known as "the Second Addendum" was created by the government. App. 115 (a lodging of a copy of the original has also been filed.) The Second Addendum responded to the Court's October 1994 Order. The Second Addendum also offered a rebuttal to the Court's legal and factual analysis, which was contrary to the legal and factual positions of the government up to that point in the proceeding. Of particular interest was a conclusory and unsupported[6] statement in the Second Addendum that the Air Force's SSB procedures were not supercompetitive. The Second Addendum was filed in the Trial Court, but the government filed no motion to reconsider the court's reinstatement and back pay order and the court did not reconsider that order. App. 100.

The government appealed. Petitioner did not cross-appeal the decision of the lower court that his SSBs conformed with 10 U.S.C. § 628. He was not concerned with whether or not a supercompetitive SSB process violated Section 628 and he did not want to be promoted by an SSB. Instead, he believed as the lower court did, that the Air Force's supercompetitive SSB process made it inappropriate under Section 1552 for the Air Force to abandon Sanders and to make his reinstatement claims depend on the determinations of supercompetitive military SSBs.

The government's position on appeal mirrored the Second Addendum, both factually and legally. Petitioner filed a *Motion to Remand to Supplement the Record* so that the provenance of the Second Addendum could be

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[6] The records supporting the Second Addendum are listed on its last page. The government's submissions during that proceeding are included at App. 135-147. A review of these documents reveals that they do not address supercompetitiveness of the SSBs.

ascertained. Petitioner maintained that the Second Addendum was facially irregular in ways that suggested that it was not a genuine product of the BCMR and was, instead generated *ex parte*, solely for litigation. In an order dated September 30, 1997, the Court of Appeals (Newman J.) denied Petitioner's motion on the ground that such a motion should have been included in his Response brief. Then, noting that Petitioner was *pro se* at the time of that filing, the Court vacated Petitioner's Response brief with leave to file a new Response and to include the remand motion therein.

Petitioner's *Brief for the Plaintiff-Appellee*, dated November 17, 1997, included a conditional motion to remand. App. 148-87. This motion requested that the Court not "rely" upon the Second Addendum unless it first remanded to determine its provenance. The government declined to respond to the merits of Petitioner's allegations.

In its decision of November 9, 1998 (App. 1), the Court of Appeals framed Petitioner's motion as a motion concerned solely with "deference" to the government's legal position and denied it on that basis. App 47 n 2. The Court then reversed the judgment of the lower court and, for the first time, held that after the enactment of 10 U.S.C. § 628 (1980), the Sanders "harmless error" standard was not controlling in cases where an officer met an SSB. The Court further reasoned that the Second Addendum afforded Petitioner all of the rights to which he was entitled under 10 U.S.C. § 1552. App. 45.

While the case was pending in the Court of Appeals, Congress passed an amendment to Section 628, *supra* at 7, which codified the Air Force's practice of convening SSBs for former officers. Thus, one of the justifications for the lower court's decision--the need to reinstate an officer prior to convening an SSB--no longer applies. The issues that are

raised in this Petition are equally pertinent to both the old Section 628 and the new Section 628.

Petitioner filed a petition for rehearing and a suggestion for rehearing in banc, which were denied on January 20, 1999. App. 48.

Reasons For Granting The Writ

I. Porter Affects the Substantial Interest of Large Numbers of Individuals; It Also Represents a Dramatic Break With Precedent

Active duty[7] officers have an enormous personal stake in continuing their active duty service. This is partly because the all-or-nothing retirement and benefits system does not vest until the twentieth year.

The most common mechanism for separating officers prior to retirement eligibility is the so-called "up-or-out" provisions of 10 U.S.C. §§ 631 and 632, which were used to separate the Petitioner. App 51. These "up-or-out" provisions authorize the involuntary separation of officers if they are twice passed over (nonselected) by promotion selection boards.

The "up-or-out" system is not perfect and when it fails, the effects are devastating, both financially and

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[7] Active duty officers fall under the provisions of the Defense Officer Personnel Management Act, set forth in Title 10, Chapter 36. The pay rights of all active duty officers (including active duty reservists) are determined under 37 U.S.C. § 204, which creates a substantive right of payment until active duty status has been properly terminated. Sargisson, 913 F.2d 918, 920 (1990). Reserve officers who are not on active duty are covered under a different statutory scheme, the Reserve Officer Personnel Management Act and, except in very limited circumstances, their pay rights are determined under 37 U.S.C. § 206. 37 U.S.C. § 206 allows for pay only if an officer has actually performed his duties.

psychologically. Historically, the most common way for the "up-or-out" system to break down is the way it broke down in Petitioner's case--the officer's record goes to a promotion board with material error in it. Each year, many hundreds (if not thousands) of active duty officers like the Petitioner file applications in the services' BCMRs, complaining of this type of error and requesting correction (voidance) of their promotion passovers. Porter affects all of these cases.

Prior to Porter, a complaint of this type was governed by Sanders, 594 F.2d 804, and its progeny. Under these pre-Porter cases, requests for correction of a promotion passover due to errors in an officer's promotion board records were considered to be meritorious if 1) the officer showed that probable material error existed in his records, 2) the officer showed that the error made his records look worse than they would have without the error, and 3) the government was unable to prove that the error was harmless (i.e., that he would likely have not been promoted in any event). Engels v. United States, 678 F.2d 173 (Ct. Cl. 1982); Hary v. United States, 618 F.2d 704 (Ct. Cl. 1980). In such meritorious cases, courts recognized a dual remedy.[8] One remedy was the correction (deletion) of the passover(s) giving rise to the officer's involuntary separation. Deletion of passovers results in constructive reinstatement and back pay in the officer's current grade, based on officers' substantive right under a pay-mandating statute to draw pay

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[8] E.g., Sanders, 594 F.2d 804; Skinner v. U.S., 594 F.2d 824 (Ct. Cl. 1979); Riley v. U.S., 608 F.2d 441 (Ct. Cl. 1979) Engels v. U. S., 678 F.2d 173; Hary v. U.S., 618 F.2d 704 (Ct. Cl. 1980); Grieg v. U.S., 640 F.2d 1261 (Ct. Cl. 1981); King v. U.S., 19 Cl. Ct. 703, aff'd per curiam, 918 F.2d 186 (Fed. Cir. 1990); Muse v. U.S., 21 Cl. Ct. 592 (1990); Germano v. U.S., 26 Cl. Ct. 1446 (1992), (cited with approval in 7 A.L.R. Fed 473 Supp. 4); Cunningham v. U.S., 39 Fed. Cl. 688 (1998); Wotowic-McGill v. U.S., 42 Fed. Cl. 318 (1998).

until properly separated. 37 U.S.C. § 204; Sanders, 594 F.2d at 810.

A second (additional) remedy was promotion reconsideration with a corrected record. This remedy has been available since 1980 through special military selection boards (SSBs) convened under 10 U.S.C. § 628. Prior to 1980, retrospective promotion reconsideration was provided pursuant to the Service Secretaries' implied authority. Doyle v. United States, 599 F.2d 984, 1000 (Ct. Cl. 1979) (en banc); see also Evensen v. United States, 654 F.2d 68 (Ct. Cl. 1981).

The duality of the historically-available remedy reflects the fundamental principle that, even in an "up or out" system, promotion and separation are separate and distinct concepts. Sanders, 594 F.2d at 816 (improper to focus attention on plaintiff's promotion rather than on the propriety of plaintiff's separation).

The primary issue in this case is the continuing viability of Sanders and the impact of Porter on officers' substantive and procedural rights under 37 U.S.C. § 204 and 10 U.S.C. § 1552. Porter holds that the Sanders "harmless error" standard, which has been the judicial standard in promotion passover cases since 1979, has been defunct since the passage of 10 U.S.C. § 628 (1980). App. 42. Under Porter, the BCMR is permitted to defer a determination whether to correct an officer's promotion passovers until after it convenes a military SSB.[9] In the event that the officer is nonselected by an SSB, the SSB nonselection relates back to and takes the place of the flawed non-selection by the original board. App. 24-25. Porter is a landmark decision. It is the first military pay case (apart from courts martial which

[9] Petitioner has no objection to the general proposition that a BCMR may convene an SSB before considering whether to void an officer's promotion passover.

are governed by an express statute) in which a new proceeding or decision has related back to the date of the original wrong. Cf. Sanders, 594 F. at 810 (promotion passovers by specially convened promotion boards do not relate back because of officers' right to draw pay until properly separated).

As a result of this relation-back, the question before the BCMR is no longer focused on the officer's original passover because that has been superseded by the SSB passover. Instead, the BCMR's inquiry is whether the *SSB* was defective under 10 U.S.C. § 628. In addition to shifting the focus of the BCMR's inquiry away from the original selection board process to the SSB, Porter drastically changes the standard for challenging both the original and the SSB promotion passover.

Prior to Porter, the standard for the correction of a promotion passover in the vast majority of cases was "harmless error." Sanders, 594 F.2d 804; see also 32 C.F.R. § 865.4 (1998) (Air Force); 32 C.F.R. § 581.3 (1998) (Army); 32 C.F.R. §723.3 (1998) (Navy). In a few military pay cases, courts have found that the error was so fundamental to the promotion process that it defied harmless error analysis. Doyle, 599 F.2d 984, was one such case. In Doyle, the en banc Court of Claims found that the Army's selection boards did not have the statutorily-required number of reserve members. Finding that it had no way to assess the impact of this error, the court held that the error was *per se* harmful. The *per se* harm (or fundamental error) rule was, until Porter, viewed as an exception to the harmless error rule in military cases in the same way that a case like Sullivan v. Louisiana, 508 U.S. 275 (1993) (absence of jury finding precludes harmless error analysis) would be viewed as an exception to the "harmless error" rule in criminal trials.

What Porter does is substitute the *exception* to the harmless error rule for the harmless error rule itself. Thus, officers are no longer entitled to deletions of their promotion passovers upon a showing of "harmful error;" they must show, instead, that there is no doubt about harmfulness[10] or that the error defies a harmless error analysis and, thus, justifies a categorical finding of harm.[11] The equivalent in a trial context would be if this Court overruled Kotteakos v. United States, 328 U.S. 750 (1946), and required all aggrieved litigants to prove that the error in their trials was so egregious that its effect could not or need not be weighed by the court.

The impact of Porter's extraordinary "relation-back" doctrine and an insuperable "egregious error" standard is three-fold. First, the relation-back of the SSB non-selection to the date of the original board eliminates the principle that active duty officers are entitled to be paid in their current grade until properly separated. See Sanders, 594 F.2d at 810.

Second, the imposition of an insuperable standard for corrections of promotion passovers effectively terminates the traditional right to draw pay in one's current grade. When an officer has been separated due to errors in the way that he was considered for promotion, he must obtain a correction (or deletion) of his passovers in order to draw pay

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[10] In the *Reply Brief for Defendant-Appellant*, Dec. 4, 1997, at 7 the Air Force articulated the AFBCMR's standard as follows: "If the AFBCMR further discovers that the discovered 'error' is so egregious that it undoubtedly resulted in the applicant's initial non-selection (e.g., applicant's military record contained another officer's disciplinary action report), the board may sua sponte void the initial promotion non-selections . . . ."

[11] Porter also states that nothing prevents the AFBCMR from considering "other material errors that might be involved in an SSB consideration." App. 41. In light of the Court's holding that BCMR's may impose an "egregious error" standard for correction of a promotion passover, this should not be read as meaning that the AFBCMR will void a promotion passover in the event of material error.

under 37 U.S.C. § 204. See Mitchell v. United States, 930 F.2d 893 (Fed. Cir. 1991). In Sanders, the en banc Court of Claims examined the issue whether it was an abuse of discretion for the AFBCMR to apply a "but for" standard to corrections of records. The Court held that such a standard did constitute an abuse because, "It would be all but impossible for a serviceman to prove he would have been promoted but for defendant's error. Thus, the ultimate burden should be on the party whose error and obfuscation of the evidence caused the problem in the first place." 594 F.2d at 816. The "egregious error" standard adopted in Porter is subject to the very same objections as the "but for" standard. It is calculated to deny relief in meritorious cases and to give the wrongdoing party (here, the Air Force) the benefit of uncertainty in the proof process.

A third effect of Porter is that its insuperable standard for correction forces the officer to pursue alternative relief under 10 U.S.C. § 628. Section 628 authorizes Service Secretaries to convene special selection boards composed of military officers for the purpose of recommending officers for promotion. Section 628 is, doubtless, a fine mechanism for vindicating an officer's (non)right to promotion. It is, however, a very poor substitute for the traditional right to a record correction in the BCMR.

The BCMR is composed of civilians who operate by majority decision and whose votes are recorded. The BCMR's decisions must be supported with reasons and must be supported by substantial evidence. They are also subject to judicial review. The SSB, by contrast is military. There is no majority consensus; the outcome is determined mathematically from the members' individual secret scores. AFR 36-89 ¶¶ 35, 14. There is no possible review of its substantive decisions because its deliberations are secret and

the members' reasoning is private. Price v. United States, __ Fed. Cl. ___ (93-536, Feb. 5, 1999).

Porter's elimination of veterans' rights under 10 U.S.C. § 1552 results in a substantial deprivation for which Section 628 provides no recompense. The losses imposed by Porter, however, do not fall entirely on servicemembers. They will also fall on Congress.

Consistent with Congress' intent to provide servicemembers with meaningful civilian-directed relief, decisions prior to Porter have emphasized the duty of BCMRs to grant full and fair relief. As stated in Sanders,

> Congress conferred broad powers on the Secretaries to remedy errors and injustices. Congress, in so doing, voluntarily and explicitly relinquished its authority in this area and terminated servicemen's access to Congress for correction of military records by way of private bill. 2 U.S.C. § 190g. The conjunction of these statutes implies that the Secretaries have a duty as well as the power to afford servicemen proper relief. . . . The Secretaries, acting through correction boards, have the authority and duty to correct records in order to correct an error or remove an injustice and to pay money found to be due when payment is necessary to correct a particular error or injustice. We have reviewed correction board actions in terms of the liberal mandate of the statute to correct errors and remove injustices, and failure to follow the purpose of the statute has been remedied in this court, a practice sanctioned by our decisions for over two decades, with no complaint from Congress.

594 F.2d at 812. This view was echoed in Yee v. United States, 512 F.2d 1383, 1387 (Ct. Cl. 1975). "When a correction board fails to correct an injustice [and/or an error] clearly presented in the record before it, it is acting in violation of its mandate." See also Skaradowski v. United States, 471 F.2d 627, 628 (1973); Duhon v. United States, 461 F.2d 1278, 1281 (1972).

In Muse v. United States, 21 Cl. Ct. 592 (1990), an Army officer met SSBs then subsequently pursued a back pay remedy. In that case, the court correctly understood its mandate:

> What is absolutely critical here is that the correction board comply with the admonition in Sanders which emphatically provides that --". . . . where an applicant has convinced a correction board to correct his record it must not grant him 'half-a-loaf' of relief." 219 Ct. Cl. at 301, 594 F.2d at 813 (citation omitted). Moreover, the Court of Claims has repeatedly stated that "military correction boards 'have an abiding moral sanction to determine, insofar as possible, the true nature of an alleged [error or] injustice and to take steps to grant thorough and fitting relief.'" Yee, 206 Ct. Cl. at 398, 512 F.2d at 1387-1388, quoting Duhon, 198 Ct. Cl. at 570, 461 F.2d at 1281; and Caddington v. United States, 147 Ct. Cl. 629, 634, 178 F. Supp. 604 (1959), cited with approval in Sanders, 219 Ct. Cl. at 301, 594 F.2d at 814. Thus, it is within the bounds of the above-stated principles that we must determine -- whether the ABCMR acted arbitrarily, capriciously . . . .

21 Cl. Ct. at 603.

In contrast to the foregoing decisions, Porter did not seem to weigh any of the detriments that would be borne by veterans as a result of the decision; nor did it appear to give any substantial weight to Congress' intent under Sections 1552 and 190(g). Further, as the following will show, Porter was based on a misreading of Section 628.

II. Porter's Construction of 10 U.S.C. § 628 Violates The Plain Language Rule

The linchpin of the Court of Appeals' analysis is 10 U.S.C. § 628(b)(3). This subsection (identical in both the old and new statute) provides:

> If a special selection board convened under paragraph (1) does not recommend for promotion a person whose name was referred to it for consideration, the person incurs no additional failure of selection for promotion.

Infra, at 6-7. According to the Court, this passage means that, unless an officer's promotion passovers are voided before an SSB is convened, an SSB non-selection *relates back* in time to the date of the original proceeding. The importance of this holding cannot be overstated. If an SSB nonselection relates back (as opposed to simply having no effect on the original non-selections), the officer must challenge his *SSB* non-selection before he can assert any claim based upon the errors in his *original* selection board. Thus, under Porter, after an SSB is convened and the officer is non-selected, the officer must show *two* things in order to obtain back pay relief in his current grade. First, he must show that his SSB non-selections were void under 10 U.S.C. § 628; then he must establish that the AFBCMR's initial decision not to void his *original* promotion passovers was incorrect. If at any time, an officer obtains new SSBs as a remedy for errors

in an earlier board, any non-selections by these new SSBs will also relate back and extinguish the officer's rights of pay.

Because of the above, Porter holds that after an officer is non-selected by an SSB, the focus of his original request to be reinstated because of errors in his original board proceeding is whether the *SSBs* were valid under Section 628. This is because, unless the officer can show that his SSBs are void, his initial application for correction of his original passovers is moot.

As the following will show, the Court's construction of Section 628(b)(3) and its conclusion that SSB nonselections "relate back" is not supported by the plain language of the statute.

Statutes must be interpreted according to their plain terms. Babbitt v. Sweet Home Chapter of Communities for a Greater Oregon, 515 U.S. 687, 697 (1995). The statutory language of subsection (b)(3)--"incurs no additional failure of selection"-- does not mean "incurs a failure of selection which relates back to and takes the place of the original non-selection." It means that the SSB nonselections will not be added to any nonselections by the original board. Thus, if an officer's original passover has been voided, a subsequent SSB non-selection will count (not retroactively, but as of the date the SSB nonselection actually occurs). If an officer's original passover has not been voided, then the SSBs non-selection is not incurred because it is an "additional failure of selection." (If at a later date, however, the original passover were voided, the SSB non-selection would no longer be "additional" and it would count.)

The analytical process by which the Court of Appeals reached its erroneous construction of Section 628(b)(3) is reflected in the Court's opinion and it, too, is erroneous. First, the Court examined the legislative history of Section 628. One sentence stood out, which in the Court's mind

meant that Congress intended for SSB non-selections to have retroactive effect: "The purpose of this subsection is to provide a means to make a reasonable determination as to whether the officer would have been selected if his pertinent records had been properly considered by the prior board, unfettered by material error. H.R. Rep. No. 96-1462, at 74 (1980)." App. 24. The Court then looked to the statute for confirmation of its view:

> The retroactive nature of an SSB's inquiry, as suggested by this legislative history, is confirmed by the text of section 628(b)(2), which specifies that an SSB considers the record of the officer as his record, if corrected, would have appeared to the board that considered him [and passed him over]. Further, the same statutory provision requires the SSB to compare the officer's record with a sampling of records of officers selected and not selected for promotion by the previous selection board. 10 U.S.C. § 628(b)(2). Even more evidence of the nunc pro tunc nature of the SSB deliberation is found in the provision that protects an officer passed over by an SSB from any additional failure of selection for promotion (unless, of course. . . the officer's initial passover is voided before his record is considered by an SSB). 10 U.S.C. § 628(b)(3). Finally, subsection (d)(2) provides that the consequences of a selection decision by an SSB relate back to the date of the selection board decision that passed the officer over. This subsection states that the officer who prevails before an SSB shall have the same position on the active duty list with the requisite pay and benefits that accrue to the rank to which the officer is promoted as a result of the SSB decision. 10 U.S.C. § 628(d)(2). As a whole, we think it is clear that

> Congress intended: (1) an SSB's decision to relate back to the date of the original selection board's decision; and (2) for the SSB's decision to stand in place of the earlier selection board decision.

App. 24 (emphasis added). This analytical process is backwards. In construing a statute, one must first examine the plain language of the statute and determine its plain meaning. One does not, through a process of eisegesis, begin with the legislative history then seek confirmation of one's view of the legislative history in the statute. Darby v. Cisneros, 509 U.S. 137, 147 (1993) ("Recourse to the legislative history ... is unnecessary in light of the plain meaning of the statutory text."); Sharp v. United States, 27 Fed. Cl. 52, 59 (1992), citing Thompson v. Thompson, 484 U.S. 174, 191-92 (1988) (committee reports are not good indicators of full legislature's will).

The plain language of Section 628(b)(1) states that a Secretary may convene an SSB for an officer "to determine whether such officer should be recommended for promotion." In similar fashion, the new version of Section 628(b)(1) reads that SSBs may be convened "to determine whether that person (whether or not then on active duty) should be recommended for promotion." Accord, DoDD 1320.11 ¶ 8 (1996) (Section 628 "specifically authorize[s] Special Selection Boards for Promotion Purposes Only"); Id, Definitions, ¶4 ("Special Selection Boards make select and nonselect recommendations, as distinguished from providing advisory opinions as to whether an officer would have been selected had an officer been properly considered by the original board.")

Reading the statute first puts the legislative history in its proper context. *In determining whether an officer*

should be recommended for promotion by an SSB, "the purpose of [subsection 628(b)] is to provide a means to make a reasonable determination as to whether the officer would have been selected if his pertinent records had been properly considered by the prior board, unfettered by material error." In context, there is absolutely nothing in the legislative history that would suggest a Congressional intent to eliminate officers' reinstatement remedies in the BCMR.

When Section 628 is read as a promotion board statute and without any assumption of a larger Congressional purpose, it is apparent that Section 628(b)(3) is nothing more than a codification of the rule already established in the courts at the time Section 628 was passed. Prior to Section 628, promotions resulting from selections by specially convened promotion boards related back to the date of the original board, just as in Section 628(d)(2). Doyle , 599 F.2d at 1000. The rule for nonselections, however, was otherwise. Sanders, 594 F.2d at 810 (promotion passovers by specially convened promotion boards do not relate back because of officers' right to draw pay until properly separated).

In sum, the statutory foundation for the Court of Appeals' analysis is faulty. The result is a decision that cannot be sustained on any statutory ground. The sole remaining argument of the Court of Appeals is its discomfort with the "harmless error" standard. Properly applied, however, the harmless error standard does not impermissibly involve judges and civilians in military affairs.

III. The Harmless Error Standard Does Not Impermissibly Involve Judges and Civilians in Military Matters.

It has long been established that courts do not involve themselves in promotion decisions. This follows from a long-standing command of the Supreme Court in Orloff v. Willoughby, 345 U.S. 83, 93 (1953):

> judges are not given the task of running the Army . . . The military constitutes a specialized community governed by a separate discipline from that of the civilian. Orderly government requires that the judiciary be as scrupulous not to interfere with legitimate Army matters as the Army must be scrupulous not to interfere in judicial matters.

On the other hand, judges are given the task of adjudicating claims for loss of pay under 37 U.S.C. § 204 and 28 U.S.C. § 1491 when an officer alleges that he was illegally separated. Sanders, 594 F.2d at 812.

The harmless error construct which is of concern to the Porter Court is imposed for the benefit of the government to prevent its having to pay money as a result of illegal conduct that causes little or no harm. Because the burden of showing harmlessness is placed on the military when the government commits material errors or injustices, it is largely within the military's control to decide the extent to which it wishes to invite civilian and judicial involvement in military matters.

By design, the "harmless error" test is designed to avoid interference with military prerogatives. Sanders, 594 F.2d at 816 (improper to focus our attention on plaintiff's promotion rather than on the propriety of plaintiff's separation"); Skinner v. United States, 594 F.2d 824, 831 (Ct. Cl. 1979) ("promotion reconsideration to determine whether errors

were harmless is inappropriate and nondispositive in an illegal discharge case"); Evensen v. United States, 654 F.2d 68, 74 (Ct. Cl. 1981) (where OER removed, no requirement that promotion be certain before a passover can be voided). The question is never whether an officer would have been promoted. Rather, it is whether the officer would have been competitive. Grieg v. United States, 640 F.2d 1261, 1265-66 (Ct. Cl. 1981) (officer in Riley v. United States, 608 F.2d 441 (Ct. Cl. 1979) entitled to reinstatement because "with th[e] illegal OERs out of his file, [he] was in the competitive zone for promotion."). The military's harmless error rule, in fact, is very similar to standards that are applied by courts in many other circumstances. See Mount Healthy City School District Board of Education v. Doyle, 429 U.S. 274, 286 (1977) (a "borderline or marginal candidate should not have the employment question resolved against him"); Kotteakos v. United States, 328 U.S. 750, 765 (1946) (if error is such that it would have "substantial influence" or if there is grave doubt about effect of error, verdict must be set aside); Cornelius v. Nutt, 472 U.S. 648, 659 n.9 (1985) (harmless error standard in civil service cases analogous to Kotteakos.)

The ultimate issue in deciding the standard of proof is where the risk of error should be placed. The approach adopted by Porter requires veterans to cede their claims because the government's errors and injustice have created an area of uncertainty which the government would rather not resolve. This is not fair. To the extent that these uncertainties cannot be resolved, the risks and burdens should be borne by the wrongdoer.

Porter would not have been difficult to resolve had the government complied with the lower court's orders. The government could have easily produced statistical evaluation data showing whether the key features of his record put him in the bottom 5% of his promotion class. The Air Force's

failure to adduce evidence in its possession should not be a basis for reversing Petitioner's judgment. Laningham v. United States, 5 Cl. Ct. 146, 151 (1984) (it is appropriate to entertain a presumption against the government when it fails to produce available relevant evidence within its control.)

IV. The AFBCMR had no Discretion to Use an "Egregious Error" Standard Under Section 1552, Given the Super-Competitiveness of Selection Board Scoring Procedures; Furthermore, Before Upholding Discretion of AFBCMR to Use an "Egregious Error" Standard Court Should Have Resolved Authenticity and Legality of the Second Addendum.

The Court of Appeals apparently believed that because the Petitioner did not appeal his SSB nonselections under 10 U.S.C. § 628, the issue of supercompetitiveness was not in the case. This was incorrect. The issue was briefed by the Petitioner and by the *Amicus Curiae* because it bore upon the Section 1552 issues that the government appealed. The AFBCMR abused its discretion under Section 1552 when it adopted an "egregious error" standard in the face of the Air Force's supercompetitive SSB standard. This exercise of its discretion, among other things, violated the BCMR's duty to provide full relief. See Ray v. United States, 453 F.2d 754 (1972), Sanders, 594 F.2d at 813.[12]

Two aspects of the SSB's procedures were found by the Trial Court to produce a supercompetitive standard. First, the government admitted in open court that the Air

[12] The constitutional basis as well as the legislative history for affording full relief are discussed in Russell O. Wheeler, *The Secretary of the Air Force, Correction of Military Records and the Limits of Discretion*, 7 Fed. Cir. Bar J. 193, 204-215 (1998).

Force's promotion boards were divided into panels, that the panels had variable quality and that the Air Force's ability to choose the best records from among the panels resulted in SSB benchmark records that were better than the records of officers promoted by the Board. App 170; App. 53. The Trial Court concluded that this process of selecting benchmark records was lawful under 10 U.S.C. § 628 because subsection (b)(2) requires only that the officer's record be compared with "a sampling" of records from the original board. While approving of supercompetitive SSB benchmarks for purposes of Section 628, the Trial Court found them to be an inappropriate tool for making "harmless error" determinations under Section 1552. App. 92 n4.

The second point made by the Trial Court was that AFR 36-89 ¶ 35(d) creates a supercompetitive scoring standard. This regulation provides that an applicant will be selected " if his or her record scores higher than all the nonselect records and ties at least one of the selected records from the original board." This rule increases the difficulty of selection by an SSB, especially if there is an inversion of select and non-select benchmarks.

For example, if the original panel selected candidates 1 through 5 and non-selected candidates 6 through 10 and the SSB panel agreed with the select and non-select outcomes of the original panel, the applicant would need only to tie the fifth best record in order to be recommended for promotion by the SSB. If, on the other hand, the cumulative scores of the SSB differed from those of the original panel and ranked, say, candidate 6 above candidate 5, the applicant would be required to be ranked above candidate 6 in order to be selected (i.e., the applicant would have to be at least tied with the fourth-ranked benchmark in order to be recommended for promotion by the SSB as opposed to tying with the fifth-ranked benchmark in the example above). In

the same vein, if candidate 6 from the original board panel received an odd high score from one of the SSB members and was ranked first on the SSB's order of merit, the applicant would be non-selected--even if he tied with the top-scoring record and was ranked higher than all of the benchmark selects. This would be the case even if the majority of the members of the SSB individually believed that the applicant was the best qualified of the entire field because AFR 36-89 is a mathematical formula that is not altered by any board member vote.

The government responded to these matters in the Second Addendum, a purported record of administrative proceedings that was created after the government lost to Petitioner. App. 115 (see also lodging with the Clerk). Petitioner challenged this Second Addendum in the Court of Appeals on the ground that it had at least a dozen irregularities indicating that it was not actually a product of the AFBCMR. App. 148-187 In October 1998, Congress passed two laws aimed at the misconduct alleged in Petitioner's remand motion. 10 U.S.C. §§ 1555, 1556.

The Court of Appeals never addressed the propriety of relying on the *facts* of the Second Addendum and instead gave assurances that it did not "defer" to the legal positions stated therein. App. 47. It did rely, however, when it stated:

> As the Air Board's [AFBCMR's] Second Addendum demonstrated, the Air Board was capable of deciding Porter's procedural challenge without having to decide whether Porter was or was not better qualified for promotion than the officers selected and not selected by the CY84B and CY85A captain promotion boards. Instead, as the Air Board noted, Porter's allegation of the

> SSB's use of impermissible competitive standards failed for lack of factual support, because of other factual information in the record that undercut Porter's claim that an impermissible supercompetitive standard had been applied to him.
>
> The foregoing responds to Porter's argument that the Air Board abdicates its statutory duties under section 1552 by recommending invocation of an SSB without coupling the SSB recommendation with a voidance of previous passover decisions.

App. 45.

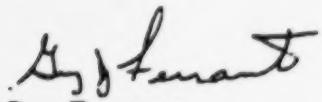
With the exception of the SSB benchmark records which are under seal, the administrative record of the 1995 AFBCMR proceeding is included in *toto* at App. 115-147. From this it is clear that there is zero evidentiary support for the Second Addendum's findings regarding super-competitiveness. In short, the Second Addendum *itself* is the only evidence in the administrative record supporting the Air Force position on that subject. As such, the Second Addendum hardly provided Petitioner with the process he was entitled to receive under Section 1552.

In the event that the outcome of this case turns on the AFBCMR's discretion to use an "egregious error" standard or on the existence of supercompetitive procedures, Petitioner submits that the government must not be permitted to defend its position based on a fraudulent record. Either the Second Addendum must be removed from the case or its authenticity and legality must be established.

Conclusion

For the foregoing reasons, certiorari should be granted.

Respectfully submitted,



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